In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 164

ABRAHAM POTTER, MAXWELL POTTER AND HAROLD POTTER, COPARTNERS, DOING BUSINESS AS POTTER'S CAMERA STORE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. 7a–20a) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on July 17, 1964. Petitioners were granted extensions of time to December 14, 1964, within which to file a motion for rehearing. No motion for rehearing was filed by that date. A motion for leave to file a motion for rehearing out-of-time was filed on Decem-

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ber 30, 1964, and it was granted on January 8, 1965. The motion for rehearing was denied on February 19, 1965. A petition for writ of certiorari was filed on May 20, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTIONS PRESENTED

1. Whether the petition for a writ of certiorari is timely.

2. Whether the Court of Claims' judgment should be reversed because, at petitioner's urging and over the government's objection, it considered evidence taken *de novo*.

3. Whether the Court of Claims improperly considered hearsay declarations or unsworn evidence.

STATEMENT

In 1956, the General Services Administration issued an inquiry for bids for twenty items to be used by the Civil Police Administration Program in South Vietnam, including revolvers, bullets and handcuffs. Petitioners were awarded the contract, which required delivery within sixty days of October 3, 1956 (Pet. App. 8a). The contract provided for delivery of Spanish-made Gabilondo revolvers, but the following provision was inserted in the contract (Ct. of Cl. Finding 6):

> The above described revolver will be tested for the U.S. Government by a private testing firm selected by GSA to determine if said revolver is equal in quality and performance to Smith & Wesson 38 Military and Police Model. If it is determined from said test that the above described revolver is not equal to Smith & Wesson

Model 38 in quality and performance, the Contractor will furnish Smith & Wesson at the same price.

Petitioners delivered seventeen of the items as provided in the contract, but failed to deliver any of the 2,000 revolvers, the 100 dozen handcuffs or the 500 cases of bullets by the specified delivery date of December 3, 1956. Two sample Gabilondo revolvers were delivered to the American Consulate on November 27, 1956, and reached the contracting officer on December 8, 1956 (Ct. of Cl. Finding 16). Pursuant to the contract, they were tested by a private firm selected by GSA, and that firm found them to be of inferior quality to the Smith & Wesson revolvers. Accordingly, the contracting officer directed petitioners to furnish Smith & Wesson revolvers. Noting that petitioners were already 15 days in default, the contracting officer notified petitioners that failure to deliver the items or to furnish evidence of shipment by January 15 might result in termination for default. Similar warnings were given in regard to the handcuffs and bullets. On January 17 and February 13, 1957, the contracting officer terminated petitioners' right to proceed with delivery of the revolvers, handcuffs and bullets, because of their failure to deliver any of those items (Pet. App. 8a; 11a).

Pursuant to the disputes clause of the contract, petitioners appealed the decision of the contracting officer to the Board of Review of the General Services Administration. The Board took evidence in four days of hearings in April 1957, and, after receiving briefs from the parties, rendered its findings and

recommendation adverse to petitioners. The recommendation was accepted by the Administrator on December 31, 1957 (Pet. App. 8a, 20a).

Petitioners brought this action in the Court of Claims in 1959. Pursuant to the practice prevailing in the Court of Claims prior to the decision of this Court in *United States* v. *Carlo Bianchi, Inc.*, 373 U.S. 709, that court received evidence *de novo*, rather than limiting its proceedings to a review of the administrative record. Following the decision in *Bianchi*, however, the United States argued that the Court of Claims should consider only the administrative findings and record and should accept those findings unless unsupported by substantial evidence. Petitioners urged consideration of the entire record, on the ground that the government had "waived its right to insist upon a mere review of the administrative record" by failing to object to the introduction of new evidence and by introducing new evidence itself (Plaintiffs' Reply Brief, pp. 3–5).

The Court of Claims agreed with the petitioners that the government had waived its right to insist upon a review of the administrative record, but ruled against petitioners on the merits. The Court of Claims held that petitioners were unable to procure or make the revolvers, bullets and handcuffs within the time specified by the contract, or even within a reasonable period of time thereafter, and that the contracting officer was therefore warranted in terminating for default petitioners' right to deliver (Pet. App. 11a-12a, 16a-17a, 18a-19a).

ARGUMENT

1. The decision of the Court of Claims in this case was rendered on July 17, 1964. Petitioners then sought and obtained extensions of time totalling approximately four months, from August 16 to and including December 14, 1964, within which to file a motion for rehearing. No such motion was filed within that period of time. On December 30, 1964, more than five months after the decision of the Court of Claims, petitioners filed a motion for leave to file a motion for rehearing out-of-time. That motion was allowed, and the motion for rehearing was denied on February 19, 1965. The petition for a writ of certiorari was filed within 90 days from the denial of the out-of-time motion for rehearing, but more than five months after the expiration of the last extension for filing a petition for rehearing granted by the Court of Claims, and more than ten months after the decision rendered on July 17, 1964. Since no petition for a writ of certiorari was filed within 90 days of the Court of Claims' decision or even within 90 days of the expiration of the rehearing period, this Court is without jurisdiction to entertain the petition. 28 U.S.C. 2101(c); *Conboy v. First National Bank of Jersey City,* 203 U.S. 141. The action of the Court of Claims in granting leave to file a motion for rehearing out-of-time could not begin a new period for the filing of a petition for a writ of certiorari. 203 U.S. at 145.[1]

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[1] This case is not one where the lower court considers on the merits a motion for rehearing which is out-of-time, but which

2. In any event, the petition raises no issue warranting review by this Court. Petitioners' principal contention is that the Court of Claims improperly took evidence *de novo* in violation of this Court's holding in *United States* v. *Carlo Bianchi, Inc.*, 373 U.S. 709 (Pet. 7–13). Not only did petitioners fail to object to this procedure before the commissioner and the Court of Claims, but they affirmatively urged the Court of Claims to approve what the commissioner had done. See p. 4, *supra*. On this issue, they prevailed in the Court of Claims. See Pet. 19a–20a. Petitioners obviously may not assert in this Court that it was reversible error for the court below to approve the principle of law they advocated.

3. Petitioners' attack on the proceedings before the Board of Review of the General Services Administration (Pet. 18–20) is also without merit. It was not error to receive into evidence a laboratory report without calling the person who conducted the tests. Since the contract expressly provided that the question whether petitioners' revolvers were equal to the Smith & Wesson would be resolved "by a private testing firm selected by GSA" (p. 2, *supra*), the relevant question was the content of the test and report,

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is filed within the period in which an appeal may be taken or certiorari may be sought. *E.g.*, *Bowman* v. *Loperena*, 311 U.S. 262, 266. Nor is it a situation where the lower court has erroneously treated a petition for rehearing as timely, thereby causing the petitioning party, in reliance upon that ruling, to forego the filing of a notice of appeal or petition for certiorari within the prescribed period. *E.g.*, *Thompson* v. *Immigration & Naturalization Service*, 375 U.S. 384; *Wolfsohn* v. *Hankin*, 376 U.S. 203.

not its accuracy or the truth of the matters stated therein. Nor does the record show that petitioners objected to consideration of the reports. And, finally, the subject matter of the report did not bear on the question of petitioners' ability to complete performance on time.

Petitioners' contention that the administrative proceedings were invalid because witnesses did not testify under oath is without merit. There is no requirement imposed by contract, statute or regulation that evidence taken in arbitral administrative proceedings be under oath.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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